Supreme Court of the United States

OCTOBER TERM, 1955

No. 343

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), LOCAL 1113,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITIONER'S REPLY BRIEF

Argument

1) Contrary to the Board's position (Board Brief, pp. 16-17) the command which Section 8(d) lays on employers and unions alike is plainly apposite here. It does not destroy the right of rescission. It merely regulates and controls that right in the interest of industrial peace.

The contract here became one terminable at will by the Employer upon its breach. Its "expiration date" therefore was that date upon which notice of termination was given (March 5, 1952).[1] All that the Act then requires is that contract conditions already agreed to by the Employers be maintained for sixty days to permit the intervention of the appropriate mediation agencies in aid of the orderly and peaceful renegotiation of a new contract.

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[1] This would seem to be true both under Board doctrine, *Lion Oil Co.*, 109 NLRB 680, and the interpretation of the Eighth Circuit, *Lion Oil Co.* v. *NLRB* (C. A. 8), 221 F. 2d 231.

The limited restrictions of 8(d) do not "penalize" (Board Brief, p. 17) an employer by leaving it without effective means of self protection in the event of a strike in breach of contract. An employer has a remedy at law in state and federal courts for damages from any breach of contract. cf. *United Electrical, Radio and Machine Workers of America (UE)* v. *Oliver Corporation* (C. A. 8, 1953), 205 F. 2d 376. Meanwhile striking employees may be disciplined, subject to their right to protest the justice of such discipline through the grievance and arbitration procedure. *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 322. At the end of the sixty-day period, if good faith contract negotiations are unsatisfactory, an employer is relieved of any obligation under the contract.

In contrast to the reasonable limitations aimed at securing industrial peace which the Act lays upon the right of rescission the position of the Board would increase industrial conflict. The Board would permit an employer to bypass contractually established grievance and arbitration procedures for the settlement of disputes by immediate termination of the contract (cf. J. A. 122) and leave the discharged employees with no forum to settle the justice of their discharge except the picket line.

2) The discharge of the non-participants plainly presents a question of law. The men and women discharged here could not have been obliged to dissociate themselves from the Union's action unless the obligation sprang from the mere fact of their Union membership. As we have shown in our previous brief this is a novel doctrine of law presenting important questions which this Court should consider.

3) Moreover the Board can rely upon the employees' alleged failure to dissociate themselves from their union's action, and respond to the Employer's statement of Feb. 28, 1952 (Pet., p. 7), only by ignoring—as it does—the last paragraph of that statement which permitted a return to

work only upon plainly illegal conditions. Cf. *Stewart Die Casting Corp.* v. *NLRB* (C. A. 7), 114 F. 2d 849, cert. den. 312 U. S. 680. It is only by rejecting *sub silentio* the previously universal doctrine that an employer cannot force employees to choose between their livelihood and submission to illegal conditions of employment that the Board can maintain that question presented is merely one of fact.[2]

4) The Board is incorrect in its assertion (Board Brief, p. 22, fn. 12) that the Trial Examiner did not find that the Employer was notified on February 28, 1952 of the termination of the stoppage. Such a finding is plain from his crediting of the Union version of the Muelver-Gaines telephone conversation on that day (Pet., pp. 26-27). It is spelled out in his decision three times.[3] The failure of the Board to accept this finding made after hearing the evi-

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[2] The Board asserts (Board Brief, p. 18) that it is "undisputed" that each of the non-participants did not advise the Employer that they did not "concur" in the stoppage of February 28, 1952. This is incorrect. The record is silent on this question as to the great majority of the employees involved. There is however, a finding by the Board that the four watchmen—whom the Employer knew had taken no part in the stoppage—were nonetheless discharged because they refused to surrender their right to belong to the Union (J. A. 190).

[3] "Moreover, were it assumed *arguendo* that Respondent could have asserted that its appraisal of the situation at 2:40 P. M. was a reasonable one, its misapprehension would plainly have become apparent to it shortly after 4 P. M., when the Union's bargaining committee endeavored to confer with Keuchle, and later with Gaines and Wall, concerning the termination of the strike and the return of the employees" (J. A. 150-151).

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"Aside from the foregoing, the strike by the participating employees ended upon the conclusion of the meeting and upon the Union's attempt to confer with Respondent's officials concerning the return of the employees" (J. A. 154).

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"However, the strike was ended around 4 P. M. on February 28, by the direction to all employees to report for work on their regular shifts and by the Union's attempts through its bargaining committee to negotiate with management for the employees' return to work after the lockout" (J. A. 158).

dence raises sharply the question of Board compliance with the decision of this Court in *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474.

Even were the Board correct this would only raise more sharply the question of whether an employer may punish all employees—innocent and guilty alike—by destroying the very mechanisms of collective bargaining and preventing receipt of notice of the termination of the stoppage.

5) In any event notice of the termination of the stoppage was plainly given on the morning of February 29, 1952, when the employees appeared at the plant gate ready for work. The Board's finding that the evidence showed that "the UE anticipated that the Respondent would be guilty of an illegal lockout under these circumstances" (J. A. 194) is directly rebutted by the findings of the Trial Examiner made after hearing the witnesses. He found as a fact that the Union did not deliberately stage the walkout "for the purpose of feinting it [the Employer] into a lockout" (J. A. 151, fn. 20).[4]

The Board's argument would damn the Union when it does and when it doesn't. On February 28th, the Board would hold the Union's approaches to the Employer insufficient because it chooses to regard them as equivocal. But on February 29th when the employees are unequivocal in their statement of desire to work the Board maintains that these actions "comport" (Board Brief, p. 22) with other motives. Plainly the Board has substituted speculation for

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[4] The Trial Examiner also made the following findings:

"For that matter, it does not appear that at the time of the walkout the Union had any formulated plan other than to hold a meeting and to decide therein what course to pursue" (J. A. 131).

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"However, the strike was ended around 4 P. M. on February 28, by the direction to all employees to report for work on their regular shifts and by the Union's attempts through its bargaining committee to negotiate with management for the employees' return to work after the lockout" (J. A. 158).

evidence as a basis for overruling findings of fact. Plainly too, the Employer was obligated both on February 28th, and 29th, to meet with the Union and by demonstrating his good faith put the good faith of the Union to the test of reality rather than hypothesis. Cf. *Times Publishing Co.*, 727 NLRB 676, 683.

Respectfully submitted,

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